TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

The following notes advise attorneys of current developments in the law and in policies. Judge advocates may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. The faculty of The Judge Advocate General's School, U.S. Army, welcomes articles and notes for inclusion in this portion of The Army Lawyer; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781.

Family Law Note

Pennsylvania Rules on Division of Special Separation Benefit and Voluntary Separation Incentive Payments in a Divorce

In 1991, to assist in the reduction of the U.S. military forces, Congress enacted legislation that provides for incentive payments that are designed to encourage members to leave the service. Congress provided two options: a one-time lump-sum payment called the Special Separation Benefit[1] (SSB) or an annual payment that is based on years of service called the Voluntary Separation Incentive[2] (VSI). Both of these programs are voluntary actions that require the service member's affirmative request and application to participate. In a divorce or separation context, it can be important to distinguish between voluntary separation and involuntary separation payments.[3]

The effect of these incentive payments on previously entered divorce decrees that awarded former spouses a portion of military retirement pay quickly became an issue. The statutes themselves did not address the issue. Using the rationale of *McCarty v. McCarty*,[4] the doctrine of federal preemption seems to prevent the division of these payments. The Uniformed Services Former Spouses' Protection Act (USFSPA),[5] however, allows state courts to divide disposable military retirement pay in a divorce action.[6] Whether USFSPA covers the SSB or VSI payments depends on how the state defines the payments—as retirement pay or marital property.

In cases where the divorce occurred before the separation from service under either the SSB or VSI program, the result depends on how the court interprets the definition of marital property. Marital property is generally defined as property that is acquired during the marriage. In *Horner v. Horner*,[7] a case of first impression in the state, Pennsylvania joined a minority[8] of states by ruling that SSB payments are not marital property and are not retirement benefits. The payments, therefore, are not divisible.[9] Karen and Daniel Horner, an Army officer, were

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1. 10 U.S.C.A. § 1174 (West 1998). The SSB is a program that entitles a service member with over six years but less then twenty years active duty service to a on-time lump-sum payment determined by 10% of the product of years of service and 12 times the monthly basic pay at the time of release from active duty. *Id.* § 1174(d)(1).

2. 10 U.S.C.A. § 1175. Service members who select the VSI must transfer to the reserves for the period of time they receive the VSI payments. The VSI is an annual payment to the service member with over six years but less then twenty years active duty service based on 2.5% of the monthly basic pay that was received at the time of transfer to the reserve component multiplied by twelve and multiplied again by the number of years of service. The service member receives the annuity for twice the number of years of service. *Id.*

3. *See* White v. White, 710 So.2d 208 (Fla. Dist. Ct. App. 1998). *White* discusses the divisibility of separation pay that is awarded to the service members who involuntarily leave the service. In *White*, Mrs. White was passed over twice for promotion in the Navy and received a lump-sum separation pay pursuant to 10 U.S.C. A. § 631. Involuntary separation pay is generally characterized as severance pay and classified as separate property of the service member. Mr. White did not receive any portion of the separation pay. This is entirely different than the statutory authorization for SSB and VSI. *See* 10 U.S.C.A. § 631.

4. 453 U.S. 210 (1981). *McCarty* is the case that led to the passage of the Uniformed Services Former Spouses' Protection Act (USFSPA). California, a community property state, refused to treat Colonel McCarty's military retirement pay as separate property. The state court divided the retirement pay equally. The United States Supreme Court found that states were federally preempted from treating federal military retirement pay as marital property. The Court found that until Congress acted, the statute that established military retirement pay did not address the issue and therefore did not allow it. *Id.* at 224.

5. 10 U.S.C.A. § 1408.

6. 10 U.S.C.A. § 1408(c)(1).

7. 24 Fam. L. Rep. (BNA) 1183 (Dec. 23, 1997, *rev'd* Feb. 10, 1998).

8. Not all states have addressed the issue. Of those states addressing the issue, Ohio is the only other state ruling that SSB and VSI are separate property of the service member. *See* McClure v. McClure, 647 N.E.2d 832 (Ohio Ct. App. 1994).

9. Horner v. Horner, 24 Fam. L. Rep. (BNA) 1183.

married for 12 years.[10] In their divorce, the court awarded Karen a percentage of Daniel's retirement pay based on the standard formula.[11] Four years after the divorce, Daniel was passed over for promotion and took advantage of the SSB program.[12] Karen petitioned the court to enforce the divorce decree and argued that the SSB was actually retirement pay.[13]

The Pennsylvania Supreme Court agreed with the lower courts that Daniel's SSB payment was not divisible because it was neither marital property nor retirement pay.[14] Like most states, Pennsylvania defines marital property as property that is acquired during the marriage.[15] The SSB program did not exist at the time of the Horner's divorce. Consequently, Daniel Horner did not acquire any interest in the SSB during the marriage, nor was it a benefit that he had anticipated.[16] Karen argued that Danie''s SSB election was analogous to a civilian employee who takes early retirement incentives, a strategy that is used by civilian companies as cost-cutting measures. Although Pennsylvania holds that these early retirement incentives, which are acquired after separation, are not divisible, Karen argued that SSB is distinguishable because the service member must repay the SSB incentive if he receives a military retirement from service in the reserve component. The court rejected that argument and held that Daniel did not have any retirement benefits to surrender at the time of divorce and at the time of selecting the SSB payment.[17] At the time that he was passed over for promotion, and elected the SSB, he had only 16 years of active service. Unlike civilian pension plans where an employee may be given the opportunity to retire early, Congress passed the SSB and VSI statutes to encourage separation from the service, rather than retirement.[18] If Daniel reaches retirement in the reserve component, Karen would receive her percentage of that retirement pay as awarded in the divorce decree.[19]

It is important for legal assistance attorneys to recognize that incentive programs, although they are not specifically covered under the USFSPA, raise issues for service members and spouses which are similar to retirement pay issues. It is imperative that attorneys consider where the divorce is taking place and address that state's treatment of these programs when counseling clients. It is also important to note that, because these payments are not true USFSPA payments, the jurisdictional restrictions that are placed on division of retirement pay by the USFSPA do not apply. Most states that have considered the issue treat SSB and VSI as divisible.[20] The issue, however, is not settled in every state. Major Fenton.

Consumer Law Notes

Consumer Protection Statutes Can Help With Landlord-Tenant Disputes—Ultimatums about Unpaid Rent Fall Under the Fair Debt Collection Practices Act

Judge advocates routinely see clients about problems in landlord-tenant relationships.[21] Many soldiers that rent their residences may fall prey to an unscrupulous landlord. Two recent decisions from the United States District Court for the

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 1184.

15. 23 PA. CONS. STAT. §3501(a)(6) (1997). Pennsylvania defines marital property as all property acquired by either party during the marriage, including the increase in value of the property, prior to the date of final separation.

16. *Horner*, 24 Fam. L. Rep. (BNA) 1183.

17. *Id.* at 1184.

18. *Id.* The court recognizes there is a big difference between separating from the military and receiving a discharge versus retiring from the military.

19. *Id.*

20. The following cases all found SSB or VSI divisible: In re the Marriage of Heupel, 936 P.2d 561 (Colo. 1997); Marsh v. Wallace, 924 S.W.2d 423 (Tex. App. 1996); Fisher v. Fisher, 462 S.E.2d 303 (S.C. Ct. App. 1995); In re Crawford, 884 P.2d 210 (Ariz. Ct. App. 1994); Kelson v. Kelson, 675 So.2d 1370 (Fla. 1996); Blair v. Blair, 894 P.2d 958 (Mont. 1995); and Kulscar v. Kulscar, 896 P.2d 1206 (Okla. 1995).

21. This service is expressly authorized in U.S. DEPT. OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-6c (10 Sept. 1995)[hereinafter AR 27-3]. Most clients are tenants because this regulation prohibits legal assistance on private business matters. *Id.* at para. 3-8. The regulation does contemplate, however, providing assistance "on matters relating to the purchase, sale, and rental of a client's *principal residence* and other real property. *Id.* at para. 3-6c. Thus, you could help a "landlord," so long as they are not renting the property as a business or investment. For example, if a soldier rents his principal residence because permanent change of stations orders require him to move, but he intends to return at some point to the home, a legal assistance attorney could assist the soldier.

Southern District of New York[22] demonstrate that familiar consumer protection tools may be useful in assisting landlord-tenant clients.

In the first case, the plaintiff, Jennifer Romea, rented an apartment in Manhattan from a realty company.[23] After Ms. Romea apparently fell behind on the rent by several months, the landlord's lawyer sent a notice informing Ms. Romea that she had three days to pay her rent or the landlord would seek to evict her.[24] The notice that the attorney sent is statutorily required in New York as a precondition to summary dispossess proceedings.[25] Miss Romea sued under the Fair Debt Collection Practices Act (FDCPA), and alleged that the notice was deficient because it:

> (a) failed to disclose clearly that defendant was attempting to collect a debt and that any information obtained would be used for that purpose;
> (b) contained threats to take actions that could not legally, or were not intended to, be taken; and
> (c) omitted notice of the required thirty day validation period.[26]

The landlord moved to dismiss the complaint by alleging that the unpaid rent was not a "debt" and the notice was not a "communication" as those terms are defined in the FDCPA.[27] In the alternative, the defendant argued that, even if those definitions were met, the court should not follow the plain language of the FDCPA because notices that are required by statute are exempt from the FDCPA under a Federal Trade Commission's (FTC) commentary to the act.[28]

Judge Kaplan made fairly short work of the defendant's definitional claims. Concerning the definition of "debt" under the FDCPA, the court agreed with the reasoning of the United States Court of Appeals for the Seventh Circuit in *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*[29] That case held that the FDCPA applies to all obligations to pay money that arise out of consumer transactions, not just those where credit is extended.[30] Judge Kaplan was "entirely persuaded by the Seventh Circuit's reasoning in *Bass*" and held that the rent was a debt under the FDCPA.[31] Regarding the defendant's second claim, the court looked to the broad statutory definition of "communication" and found that the defendant had "no colorable argument that [the eviction notice] does not satisfy the FDCPA's sweeping definition of 'communication.'"[32]

The issue of "whether there is any proper basis for deviating from the plain meaning of [the] unambiguous language" in the statute was more complex.[33] The defendant had a particularly strong claim here because "the 1988 Federal Trade Commission staff commentaries on the FDCPA . . . purport to exclude from FDCPA coverage a notice that is required by law as a prerequisite to enforcing a contractual obligation between creditor and debtor, by judicial or nonjudicial legal process."[34] In reaching its decision, the court borrowed the United States Supreme

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22. Romea v. Heiberger & Assocs., 988 F. Supp. 712 (S.D.N.Y. 1997), *permission for interlocutory appeal granted* Romea v. Heiberger & Associates, 988 F. Supp. 715 (S.D.N.Y. 1998); Ali v. Vikar Management Ltd., 994 F. Supp. 492 (S.D.N.Y. 1998).

23. *Romea*, 988 F. Supp. at 713.

24. *Id.*

25. *Id.*

26. *Romea*, 988 F. Supp. at 713.

27. *Id.* at 713-14.

28. *Id*. at 714-15. The FDCPA defines "debt" as: "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. A. § 1692a(5) (West 1998). "Communication" is also defined broadly as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C.A. § 1692a(2).

29. 111 F.3d 1322 (7th Cir. 1997). For a more detailed discussion of *Bass* and the issue of what constitutes a debt under the FDCPA, *see* Consumer Law Note, *Seventh and Ninth Circuits Hold That Bad Checks are Debts Under the FDCPA*, ARMY LAW., Feb. 1998, at 29.

30. *Bass*, 111 F.3d at 1326.

31. Romea v. Heiberger & Assocs., 908 F. Supp. 712, 714 (S.D.N.Y. 1998).

32. *Id.*

33. *Id.*

34. *Id.*

Court's rationale in *Heintz v. Jenkins*.[35] In that case, the FTC had sought to exclude some attorney work from the FDCPA. The Court rejected the exclusion and noted that "the commentaries themselves state that they are 'not binding on the commission or the public."[36] The United States Supreme Court also found that the FTC's interpretation of this FDCPA provision was not reasonable and that there was nothing in the act to indicate that the FTC had the power to create an exception that was not provided for in the statute.[37] Judge Kaplan found that the *Romea* case fell "squarely within the reasoning of *Heintz*."[38] Thus, he rejected the defendant's motion to dismiss and found that the plaintiff had a colorable claim under the FDCPA.[39]

This case is important for legal assistance practitioners for at least two reasons. First, it highlights another tool to use in protecting clients from landlords. Second, and perhaps more importantly, it shows that consumer advocates must "think outside the box." Consumer problems cannot usually be categorized under one statute or rule. Rather, the attorney must use all of the tools that are available to attack the problem. In this case, an attorney's innovative use of the FDCPA worked well for her client. In their negotiations on behalf of their clients, judge advocates should also pursue original legal theories that utilize all possible remedies, in their negotiations on behalf of their clients. Major Lescault.

Landlord Access to Credit Reporting Agency Information is Limited

The United States District Court for the Southern District of New York recently provided guidance on applying the Fair Credit Reporting Act (FCRA) to landlord-tenant cases. In *Ali v. Vikar Management Ltd*,[40] the court was asked to rule on a motion for summary judgment in a case which alleged that the defendant violated the FCRA by accessing information from the plaintiff's credit report file.[41] The court held that landlords violate the FCRA when they obtain address information under false pretenses and access credit reports for a purpose that is not authorized by the FCRA.[42] The Court summarized the facts of the case in this way:

> The plaintiffs in these related cases are tenants in rent stabilized apartments. Their landlord suspected that they actually reside elsewhere. If that were true, the tenants would not be eligible to keep the rent stabilized apartments and the landlord could evict them.
> . . . .
> Through its managing agent, the landlord obtained information about the tenants from a consumer credit reporting agency. The landlord sought this information not to check on the tenants' credit worthiness, but to verify their primary place of residence. For at least two of the tenants, the managing agent made false representations to obtain the information.[43]

The plaintiffs sued the landlord's management company and alleged violations of the FCRA. All of the parties sought summary judgment.

In analyzing the plaintiff's FCRA claims, the court saw "two aspects of the FCRA at issue in this case: (1) using a consumer report for a permissible purpose pursuant to 15 U.S.C.A. § 1681b; and (2) obtaining consumer information under false pretenses as proscribed by 15 U.S.C. A. § 1681q."[44] The court held that address information that was contained in the consumer's credit report file was not a "consumer report" as that term is

35. 514 U.S. 291 (1995).

36. *Id.* at 298.

37. *Id.*

38. Romea v. Heiberger & Assocs., 988 F. Supp. 715 (S.D.N.Y. 1998).

39. *Id.*

40. 994 F. Supp. 492 (S.D.N.Y. 1998).

41. *Id.* at 494.

42. *Id.*

43. *Id.*

44. *Id.* at 497 (citing 15 U.S.C.A. § 1618q (West 1998)).

used in the FCRA.[45] Thus, the release of this information was not limited to the permissible purposes for consumer reports under the act.[46] The Court went on to say, however, that using false pretenses to obtain any information subjects the requester to liability under the FCRA "even if the information supplied by the consumer reporting agency [is] not a consumer report."[47] Therefore, the court granted summary judgment to all plaintiffs whose addresses had been obtained under false pretenses.[48]

The situation of one of the plaintiffs is particularly useful to practitioners. The defendant accessed plaintiff Ramsaroop's complete credit report.[49] The defendant claimed that the mere existence of the landlord-tenant relationship justified its accessing a tenant's credit report.[50] The court rejected this notion. While Judge Chin did note that there were legitimate circumstances that allow landlords to access credit reports, there was no generalized authorization based upon the relationship itself.[51] Thus, landlords may only access a credit report when they need the information for one of the permissible purposes defined by the FCRA.[52]

Decisions like this, together with recent changes to the FCRA,[53] help restore the proper balance between a business's legitimate need for information and a consumer's right to privacy. This decision is also another good example of an attorney that examines the entire fact scenario and uses the tool that is best suited to protect the consumer. A practitioner might look at this case, categorize it as a landlord-tenant matter, and restrict his thinking and research to that area of the law. Doing so would be a disservice to the client. Like the attorneys in this case, practitioners must look at the entirety of the situation and frame the case in a way that is best suited to protect the interests of their clients.

Judge advocates must continue to think like the attorneys in the two cases discussed above. Because of our diverse client base, unique circumstances are found in every case. A situation that may initially appear to fit into a particular area of the law, may actually be resolved more favorably for your client if you consider other consumer protection laws. When you consider common scenarios, such as landlord-tenant cases, think through all of the "tools" in your consumer protection "toolbox" before you decide how to proceed. Doing so will expand the possible avenues of help that are available to your client and make you a more effective legal assistance attorney. Major Lescault.

Tax Law Note

New Tax Credits Increase Necessity to Review Form W-4

For years legal assistance attorneys and tax assistance officers have educated the military community concerning correctly calculating federal income tax withholding. Despite the "thrill" of receiving a large federal income tax refund, the reality of a large refund is that the taxpayer most likely inaccurately computed the withholding of taxes. A taxpayer can have more money in their paycheck each month by carefully reviewing their withholding allowances on an Internal Revenue Service (I.R.S.) Form W-4. A large refund, on the other hand, is equivalent to giving the I.R.S. an interest free loan for twelve to eighteen months.

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45. *Id.* A "consumer report" is defined as:

> [a]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—
>
> (A) credit or insurance to be used primarily for personal, family, or household purposes;
>
> (B) employment purposes; or
>
> (C) any other purpose authorized under section 1681b of this title.

15 U.S.C.A. § 1681a(d). The *Ali* Court found that "Address information on a consumer, for example, is not a consumer report because it is not information that bears on any of the characteristics described" in the definition of "consumer report." Ali v. Vikar Management Ltd., 994 F. Supp. 492, 497 (S.D.N.Y. 1998).

46. *Ali*, 994 F. Supp. at 497. The FCRA only allows a Credit Reporting Agency to release a consumer report under limited circumstances. *See* 15 U.S.C.A. § 1681b (West 1998).

47. *Ali*, 994 F. Supp. at 497, *citing* Berman v. Parko, 986 F. Supp. 195, 214 (S.D.N.Y. 1997).

48. *Id.* at 499-500.

49. *Id.* at 495-96.

50. *Id.* at 500.

51. *Id.*

52. *Id. See also* 15 U.S.C.A. § 1681a(d).

53. The 1997 changes to the FCRA did not have any effect on the *Ali* case or its rationale. Ali v. Vikar Management Ltd., 994 F. Supp. 492, 497 n.4 (S.D.N.Y. 1998). For a discussion of the changes, *see* Consumer Law Note, *Fair Credit Reporting Act Changes Take Effect in September*, ARMY LAW., Aug. 1997, at 19.

For tax year 1997, the average federal income tax refund was $1325.[54] The I.R.S. anticipates that federal tax refunds for tax year 1998 will be higher for many taxpayers due to new tax credits. Tax credits are dollar-for-dollar reductions in the amount of tax that is owed. The new child tax credit[55] should have the most impact for individual taxpayers; however, there are also two new higher education tax credits which may also impact an individual's tax liability.[56] For many taxpayers in the military community, these new tax credits will lower taxes and result in larger refunds if service members do not adjust their withholding allowances.

For 1998, the new child tax credit is $400 for each eligible dependent under the age of seventeen.[57] In 1999, this credit will increase to $500 per child. The child tax credit will phase out for higher income taxpayers, however; the phase-out should only affect a small segment of the military community.[58] The child tax credit generally cannot be more than the tax liability.[59] This means that it can reduce a taxpayer's income tax to zero, but it cannot result in a refund. There are some exceptions for taxpayers who have three or more qualifying children or who claim the earned income tax credit.[60] As is the case with dependency exemptions, no child care credit is allowed for a child for a tax year unless the taxpayer includes the child's name and social security number on the return for the year.[61]

Along with the child tax credit, there are two new higher education tax credits for 1998. The Hope Scholarship[62] and the Lifetime Learning credits[63] are both based on qualified tuition and related fees[64] that are paid for the taxpayer, spouse or an eligible dependent.[65] The taxpayer should be careful to reduce qualified tuition and related expenses by scholarships, Pell Grants, employer-provided educational assistance, and other tax-free payments.[66] The student must be enrolled[67] for at least one academic period (semester, trimester, or quarter)[68] at an eligible educational institution during the year. For each eligible student, a taxpayer may claim only one of the education credits

54. I.R.S. News Release IR-98-39 (May 13, 1998).

55. I.R.C. § 24 (West 1998).

56. I.R.S. News Release IR-98-39 (May 13, 1998).

57. A qualifying child is a natural child, stepchild, grandchild or eligible foster child that is under age 17. I.R.C. § 24(c)(1)(C). A qualifying child must be a citizen or national of the United States and someone that can be claimed for federal income tax purposes as a dependent. I.R.C. § 24(c)(2).

58. The child tax credit will phase out for single taxpayers with incomes that exceed $75,000, married filing jointly with incomes that exceed $110,000, married filing separate returns with incomes of more than $55,000. I.R.C. § 24(b)(2). The credit is reduced by $50 for each $1000 of modified Adjusted Gross Income (Adjusted Gross Income increased by excluded income from foreign, U.S. possessions, and Puerto Rico sources) above these amounts. I.R.C. § 24(b)(1) (West 1998).

59. I.R.C. § 26.

60. For families with three or more qualifying children, an alternative credit is available if it exceeds the regular child credit available after application of the tax liability limitation of I.R.C. § 26. The alternative credit is figured by adding the taxpayer's social security taxes for the tax year to the I.R.C. § 26 limitation amount, and reducing that sum by all nonrefundable credits and by the earned income credit other than supplemental child care credit of I.R.C. § 32(n). This additional child credit is refundable. I.R.C. § 24(d).

61. I.R.C. § 24(e) (West 1998).

62. I.R.C. § 25A(b) (West 1998).

63. I.R.C. § 25A(c).

64. Qualified tuition and related expenses mean tuition and fees that are required for the enrollment or attendance of a child at a post-secondary educational institution that is eligible to participate in the federal student loan program. They do not include the costs of books, room and board, transportation, and related expenses. Expenses for courses that involve sports, games, or hobbies do not qualify unless they are part of a student's degree program. Nonacademic fees, such as student activity fees, athletic fees, and insurance expenses, do not qualify. I.R.C. § 25A(f).

65. An eligible dependent is a person who can be claimed as a dependency exemption. It generally includes unmarried children under the age of 19 or who are full-time students who are under the age of 24 if the taxpayer supplies more than half the child's support for the tax year. If a dependency exemption for an individual is allowed to another taxpayer, the dependent cannot claim the Hope credit, and any qualified tuition and expenses that are paid by the dependent during the tax year are treated as paid by the taxpayer who is allowed to take the dependency exemption. I.R.C. § 25A(g)(3). It is important to note that a person who is a nonresident alien for any portion of the year may elect a Hope or Lifetime Learning credit only if he elects under I.R.C. § 6013(g) or (h) to be treated as a resident alien. I.R.C. § 25A(g)(7).

66. However, qualified amounts do not have to be reduced by amounts that have been paid by gift, bequest, devise, or inheritance. I.R.C. § 25A(g)(2). In addition, no credit is allowed for any expense for which an income tax deduction is allowed. I.R.C. § 25A(g)(5).

67. The student must carry at least half of the normal full-time workload for the course of study that he is pursuing. I.R.C. § 25A(b)(3)(B).

68. If qualified tuition and expenses are paid during one tax year for an academic period that begins during the first three months of the next tax year, the academic period, beginning in the earlier year, is treated for these credit purposes. I.R.C. § 25A(g)(4).

in a single tax year.[69] The higher education credits phase out for some taxpayers.[70] In addition, if a student receives a tax free distribution from an education Individual Retirement Account (IRA) in a particular tax year, none of that student's expenses can be used as the basis of a higher education tax credit for that year.[71]

The Hope credit is available only for the first two years of a student's post-secondary education.[72] Taxpayers may elect a personal nonrefundable tax credit that is equal to 100% of the first $1000 of qualified higher-education tuition and related expenses paid during the tax year for education furnished to an eligible student, plus half of the next $1000.[73] The maximum credit is $1500 a year for each eligible student.[74] The Hope credit applies to payments that are made after 1997 for academic periods beginning after that year.

The Lifetime Learning credit, which applies to expenses that are paid after June 30, 1998, is available for any level of higher education. The credit is twenty percent of up to $5000 of qualified tuition and related expenses that are paid during the tax year with a maximum credit of $1000 per year.[75] The Lifetime Learning credit differs from the Hope credit because it covers a broader period and range of educational courses. By contrast, the Hope credit only applies to the first two years of post secondary education; the Lifetime Learning credit applies to expenses for undergraduate, graduate, and continuing education courses. Therefore, expenses for courses of instruction at an eligible institution that are taken to acquire or improve job skills that would not qualify for the Hope credit will qualify for the Lifetime Learning credit.[76]

Legal assistance attorneys and tax officers should encourage members of the military community to review the new tax credits. If these new tax credits benefit the military taxpayer, then the taxpayer should consider changing his tax withholding. Internal Revenue Service Publication 919 entitled "*Is my Withholding Correct for 1998?*," explains how to analyze and factor in the benefits of the new child and higher education tax credits when adjusting tax withholding. It also includes a Form W-4 that can be submitted to local military finance offices to change the amount of tax withholding and worksheets to help taxpayers to correctly determine the tax effect of the new credits. Military families can reap an early benefit from the new child tax credit and add money to their paychecks by filing a new Form W-4.

A more expansive review of recent changes to the Internal Revenue Code that impact upon service members will be presented in the November issue of *The Army Lawyer.* Internal Revenue Service publications and tax forms are available from the I.R.S. web site at <http://www.irs.ustreas.gov> or by calling 1-800-TAX-FORM. Major Rousseau.

Criminal Law Note

Defense Concessions May Not Be Enough to Exclude Uncharged Misconduct

Introduction

Military Rule of Evidence (MRE) 404(b)[77] prohibits the government from offering uncharged misconduct, or "bad acts" evidence, to prove that the accused is a bad person. However, the government may use "bad acts" evidence to prove an element of a charged offense, such as intent or identity.[78] The military judge should consider several factors when balancing the

69. I.R.C. § 25A(c)(2).

70. Availability of the higher education credit phases out ratably for taxpayers with modified Adjusted Gross Income (Adjusted Gross Income increased by foreign, possessions, and Puerto Rico income inclusions) of $40,000 to $50,000 for single filers, and $80,000 to $100,000 for joint return filers. I.R.C. § 25A(d) (West 1998). Married taxpayers must file jointly to claim the credit. I.R.C. § 25A(g)(6) (West 1998).

71. I.R.C. § 530(d) (West 1998).

72. I.R.C. § 25A(b)(2).

73. I.R.C. § 25A(b)(1).

74. I.R.C. § 25A(a)(1); I.R.C. § 25A(b)(1); I.R.C. § 25(e)(1).

75. I.R.C. § 25A(c)(1).

76. I.R.C. § 25A(c)(2)(B).

77. Military Rule of Evidence (MRE) 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404(b) (1995) [hereinafter MCM].

78. *Id.*

probative value of "bad acts" evidence against the danger of unfair prejudice to the accused.[79] One factor is whether there are other means to prove the element at issue. For example, the accused may offer to concede an element of the offense to prevent the government from offering "bad acts" evidence under MRE 404(b). An offer by the defense to concede an element, however, may not be enough to exclude uncharged misconduct.

In *United States v. Crowder (Crowder II)*,[80] the United States Court of Appeals for the District of Columbia held that a defendant's offer to concede the element of intent does not *per se* prohibit the government from using "bad acts" evidence to prove intent.[81] *Crowder II* is a reconsideration and reversal of the court's earlier opinion in *Crowder I*.[82] In *Crowder I*, the court ruled that the defense could prohibit the government from introducing "bad acts" evidence under Federal Rule of Evidence 404(b)[83] by conceding intent.[84]

Facts

Crowder involved two cases (Crowder and Davis) that were combined on appeal. In *Crowder*, three police officers saw Rochelle Crowder engage in an apparent drug transaction by exchanging a small object for cash. The police stopped and gestured for Crowder to approach. Crowder turned and ran and the police followed him. During the chase, Crowder discarded a brown paper bag. The brown bag contained 93 zip-lock bags of crack cocaine and 38 wax-paper packets of heroin. While searching Crowder, the officers also found a beeper and $988 in small denominations. Crowder denied ever possessing the bag containing drugs. His first trial ended in a mistrial.[85]

At his second trial, the government gave notice of intent to prove Crowder's knowledge, intent, and modus operandi with evidence that Crowder sold crack cocaine to an undercover officer in the same area seven months after his initial arrest.[86] To keep this evidence from the jury, Crowder offered to stipulate that the amount of drugs that were seized was consistent with distributions; therefore, anyone who possessed them had the intent to distribute. The judge refused to force the government to stipulate and admitted evidence of the later sale over defense objection.[87]

In the companion case, an undercover police officer, purchased a rock of crack cocaine from Horace Davis on a Washington, D.C. street corner. After the transaction, the undercover officer broadcast Davis' description over the radio. Davis was apprehended near the scene a few minutes later as he opened his car door. During a subsequent search of the car, the police found 20 grams of crack cocaine.[88]

At trial, Davis put on a defense of misidentification. He claimed that he had walked out of a nearby store just before his arrest. The government gave notice of intent to introduce evidence that Davis made three prior cocaine sales in this same area in order to prove his knowledge of drug dealing and his intent to distribute. In an effort to exclude this evidence, Davis offered to stipulate that the person who sold the drugs to the undercover officer had the knowledge and intent to distribute. The district court ruled that the government did not have to

79. MCM, *supra* note 77, MIL. R. EVID. 403.

80. United States v. Crowder, 141 F.3d 1202 (D.C. Cir. 1998).

81. *Id.* at 1204.

82. United States v. Crowder, 87 F.3d 1405 (D.C. Cir. 1996) (en banc) [hereinafter Crowder I].

83. Federal Rule of Evidence (FRE) 404(b) is identical to the military rule and provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

FED. R. EVID. 404(B).

84. *Crowder*, 87 F.3d at 1410.

85. *Crowder*, 141 F.3d at 1204.

86. *Id.* at 1203.

87. *Id.* at 1204.

88. *Id.*

accept Davis' concession and could prove knowledge and intent through Davis' prior acts.[89]

Case History

In *Crowder I,* the D.C. Circuit held that a defendant's unequivocal offer to concede the element of intent, coupled with an instruction to the jury that the government no longer needed to prove that element, made the evidence of other bad acts irrelevant.[90] The court reasoned that the defense concession, combined with the jury instruction, gave the government everything it required and eliminated the risk that a jury would consider the uncharged misconduct for an improper purpose.[91]

The United States Supreme Court granted certiorari.[92] The Court then vacated the judgment in *Crowder I* and remanded the case for further consideration in light of its opinion in *Old Chief v. United States*.[93] In *Old Chief*, though the Court held that the government should have acquiesced to the defense's offer to stipulate, the Court said that this case was an exception. Justice Souter, writing for the majority, affirmed the general rule by saying "when a court balances the probative value against the unfair prejudicial effect of evidentiary alternatives, the court must be cognizant of and consider the government's need for evidentiary richness and narrative integrity in presenting a case."[94] The Court also said "the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense."[95]

Crowder II Analysis

On remand, the United States Court of Appeals for the District of Columbia Circuit reversed its earlier decision, and held that the district court did not err by admitting evidence of uncharged misconduct under Rule 404(b), notwithstanding the defense's willingness to concede intent.[96] The majority noted that *Crowder I* was based on the premise that a defendant's offer to concede a disputed element renders the government's evidence irrelevant. In *Crowder II*, the court reasoned that this premise failed in light of the United States Supreme Court's holding in *Old Chief*. Evidentiary relevance[97] under Rule 401 is not affected by the availability of alternative forms of proof, such as a defendant's concession or offer to stipulate.[98]

According to the court, the analysis of "bad acts" evidence does not change simply because the defense offers to concede the element at issue. The first step in the analysis remains whether the "bad acts" evidence is relevant under Rule 401. If the government's evidence makes the disputed element more likely than it would otherwise be, the evidence is relevant despite the defendant's offer to stipulate. The next question is whether the government is attempting to properly use the evidence under Rule 404(b). Finally, even if the evidence is both

89. *Id.* at 1205.

90. United States v. Crowder, 87 F.3d 1405, 1410-11 (D.C. Cir. 1996).

91. *Id*. at 1414.

92. United States v. Crowder, 117 S.Ct. 760 (1997).

93. 117 S.Ct. 644 (1997). In 1993 Johnny Lynn Old Chief was arrested after a fight that involved at least one gunshot. Old Chief was charged, inter alia, with violating 18 U.S.C. § 922 (felon in possession of a firearm) and aggravated assault. Old Chief had been previously convicted of assault causing serious bodily injury. In order to keep this prior conviction from the jury, Old Chief offered to stipulate that he was previously convicted of a crime that was punishable by imprisonment that exceeds one year. *Id*. at 648. The government refused to join in a stipulation. The district court ruled that the government did not have to stipulate and the Ninth Circuit affirmed. *Id.* at 648-49. The United States Supreme Court granted certiorari and reversed. *Id.* at 656. The Court ruled that it was an abuse of discretion under FRE 403 for the district court to reject the defendant's offer to concede a prior conviction in this case. The district court erred in admitting the full judgment over a defense objection when the nature of the prior offense raised the risk that the jury will consider the prior judgment for an improper purpose. It was significant that the only legitimate purpose of the evidence was to prove the prior conviction element of the offense. *Id.* at 647-56.

94. *Id.* at 653-54.

95. *Id*.

96. United States v. Crowder, 141 F.3d 1202, 1209 (D.C. Cir. 1998).

97. For military practitioners the definition of relevant evidence is contained in MRE 401 this rule provides that "relevant evidence [is] evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MCM, *supra* note 77, MIL. R. EVID. 401.

98. *Crowder*, 141 F.3d at 1209.

relevant and admissible under Rule 404(b), the trial judge can still exclude the evidence if it is unfairly prejudicial, cumulative, or misleading.[99] One factor that the trial judge should consider when making a balancing determination under Rule 403 is whether the defendant is willing to concede the element that the evidence is being offered to prove.[100] Counsel will need to focus their efforts on whether a defense offer to concede an element renders the "bad acts" evidence unduly prejudicial.[101]

Advice to Practitioners

Old Chief and *Crowder II* have important implications for military practitioners. In *Old Chief*, the United States Supreme Court recognized that the trial judge must be cognizant of the government's need for "evidentiary richness."[102] The Court also accepted the proposition that the government is entitled to prove its case free of a defendant's offer to stipulate. This does not bode well for defense counsel who seek to limit the trial counsel's use of uncharged misconduct through stipulations.

The District of Columbia Circuit's reconsideration and reversal of its earlier opinion in *Crowder II* further complicates the defense counsel's task. In the future, defense counsel will be hard pressed to argue that their willingness to stipulate to a disputed element renders the government's "bad acts" evidence irrelevant. In light of these cases, the better approach for defense counsel is to argue that an accused's willingness to concede the element makes the "bad acts" evidence unfairly prejudicial.

On the other hand, government counsel should use the decisions in *Old Chief* and *Crowder II* to their advantage. Government counsel should cite the United States Supreme Court's language and argue that the defense cannot dictate the manner in which the government may try its case. Trial counsel must articulate why a stipulation would deny them the ability to preserve the evidentiary richness and narrative integrity of the 404(b) evidence. Finally, government counsel should argue that the defense's willingness to concede the disputed element is only one factor that the military judge should consider in a balancing under MRE 403. The government must show how other factors tip the scale in favor of admissibility.

Conclusion

Crowder I gave the defense counsel a powerful tool that could be used to limit the government's introduction of "bad acts" evidence under Rule 404(b). Unfortunately for the defense, times have changed. The United States Supreme Court's decision in *Old Chief* and the District of Columbia Circuit's reversal in *Crowder II* severely weakens the defense's ability to force the government to stipulate to elements of the offense in order to exclude "bad acts" evidence. In the future, the best that defense counsel can hope for is that their willingness to stipulate renders the government's "bad acts" evidence unfairly prejudicial. On the other hand, as long as the government can convince the military judge that the "bad acts" evidence is proper and not unfairly prejudicial, it should be able to try its case free from forced defense concessions. Major Hansen.

International and Operational Law Note

A Problem Solving Model for Developing Operational Law Proficiency: An Analytical Tool for Managing the Complex

Teach me and I'll Forget;
Show me and I'll Remember;
Let me do and I'll Understand

The following note is designed to introduce a proposed model for developing operational law problem solving skills. A comprehensive package of materials that is intended to allow implementation of this model will be available for distribution during the upcoming World-Wide Continuing Legal Education (WWCLE) Course at TJAGSA. However, the general frame-

99. *Id*. at 1210. *See also* MCM, *supra* note 77, Mil R. Evid. 403.

100. *Id.*

101. Although no military court has addressed this issue directly, the Court of Military Appeals hinted at the issue in *U.S. v. Orsburn*, 31 M.J. 182 (C.M.A. 1990), *cert. denied*, 498 U.S. 1120 (1991). Staff Sergeant Steven Orsburn was charged with indecent acts with his eight-year-old daughter. The government offered evidence of three pornographic books found in Orsburn's bedroom to show his intent to gratify his lust or sexual desires. *Id* at 188. The defense argued that the evidence was irrelevant because if someone did commit indecent acts with the eight-year-old girl, there was no question that he did so with the intent to gratify his lust or sexual desires. The military judge admitted the evidence over the defense's objection. Chief Judge Sullivan, writing for the majority, held that the military judge did not abuse his discretion in balancing the probative value of this evidence against the danger of unfair prejudice. *Id.* Judge Sullivan noted that Orsburn "refused to commit himself on the issue of intent or provide any assurances that he would not dispute intent." *Id.* In light of *Old Chief* and *Crowder II*, a defense offer to concede the element of intent should not act as a *per se* bar to the use of "bad acts" evidence in military practice.

102. *Old Chief*, 117 S.Ct. at 651.

work that is presented here is offered as a foundation for implementing such a skill development program at the installation.[103]

This skill development concept is motivated by a belief that the scope and diversity of operational legal issues mandates some mechanism to better manage analysis in the operational environment. Additionally, it is based upon a belief that an analytical tool that assists operational law attorneys to anticipate issues might enhance the ability of judge advocates to provide proactive legal support. The resulting analytical template is the foundation for this program.

This template, attached at Appendix A and described in detail below, is similar to some analytical tools that are used in the tactical intelligence arena. It is intended to serve two purposes. First, it simplifies issue resolution by focusing legal analysis into manageable categories. Second, it improves issue resolution by strengthening the judge advocate's ability to anticipate legal issues related to the operation.

This model shares a common thread with the Intelligence Preparation of the Battlefield (IPB) analytical model—that a systematic approach to anticipating issues is the best way to prepare to resolve those issues when they arise. Anticipating issues in order to enhance success on the battlefield is the essence of the IPB process. In the operational law arena, a systematic approach to anticipating legal issues might result in a more proactive, versus reactive, delivery of legal support to any given military operation. In short, a judge advocate could conduct a Legal Preparation of the Battlefield (LPB) in order to anticipate probable legal issues, and prioritize the order of response to such issues.

The function of the chart at Appendix A is designed to fulfill this purpose. It creates analytical categories by intersecting each phase of an operation with six legal operating systems—broad categories of legal issues likely to be encountered during a military operation. These legal operating systems are described in Appendix B. There are two anticipated benefits of thinking in terms of such categories. The first benefit relates to the synchronization of the focus of legal support with the focus of supported commanders and their planners. The second benefit relates to improving the ability of the judge advocate to manage the tremendous diversity of legal issues that he will encounter during an operation. This in turn makes analysis of these issues more efficient and aids in identifying where to focus effort.

It is important to recognize, however, that both the phases of the operation, (and to a lesser extent, the legal operating systems) represented on this chart, are intended for a Joint Readiness Training Center (JRTC)-type operation. Modification of this chart to better fit the parameters of a specific mission would only enhance its value to an operational judge advocate. An example of such a modification, developed by Lieutenant Colonel Karl Goetzke, is shown at Appendix C. Lieutenant Goetzke developed this modification in response to a request to review the original matrix and consider how it could be applied to Operation Joint Endeavor. Regardless of modification, however, the basic value remains the same: focusing the thought process into manageable "boxes."

For training purposes, the concept that this note is intended to introduce is the use of this template to identify six legal issues related to each phase of a notional JRTC deployment. As indicated above, during the upcoming WWCLE, a comprehensive package of materials will be available for staff judge advocates (SJAs) who are interested in implementing this Leadership Development Program. These materials will include a basic factual scenario, the template filled in with thirty-six legal issues, a narrative explanation of each legal issue, and a fact sheet-type solution for each legal issue. The proposed concept is for SJAs to use these materials as the foundation for a Leadership Development Program that emphasizes operational law problem solving and briefing skills.

The process begins with the operational law attorney (or Leadership Development Program coordinating officer) creating analysis teams that are composed of personnel from the Office of the Staff Judge Advocate. The program coordinator will then brief the basic scenario to six teams of office personnel who will resolve the issues. This includes a review of the hypothetical mission. The SJA will role-play the Joint Task Force Commander and highlight his intent. The analysis teams

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103. The genesis of this proposal was the use of this model during an elective in the 46th Graduate Course. This elective focused on a clinical approach to developing operational law expertise—application of knowledge previously presented during the core instruction to actual scenario-driven events. The concept of building an elective around scenario-driven issue resolution originated with Major Rich Whitaker, and became the original "military operations" elective for the 45th Graduate Course. This elective focused on a notional deployment and the resolution of issues for a Staff Judge Advocate (SJA) who was preparing for various aspects of the deployment.

During the next iteration of the elective, the concept of a scenario-driven series of operational legal issues was refined in a number of ways. First, the class was divided into six "teams" for the entire six weeks. Each team worked together each week to resolve a designated legal issue, selecting one member to brief a resolution of the issue during the class. Second, the briefing was not presented to a hypothetical SJA, but instead to a hypothetical joint task force commander. Third, in order to ensure the problems presented to the students reflected current issues that were being confronted in the field, representatives from the Center for Law and Military Operations participated in every aspect of the class.

The success of the process used in the class led to discussion with the Center for Law and Military Operations on how the model might be offered to a wider audience. One concept that was suggested was video taping sessions and using the tape as a "distance learning" tool. However, there was strong consensus that the interactive nature of the briefings would be lost by simply having officers view a video taped session.

will be given the basic scenario and one legal issue from a legal operating system for the first phase of the operation. The next six Leadership Development Program sessions will consist of team briefings to the SJA by each analysis team, in his role as the commander, on the resolution of its legal issue for that phase of the operation. The program coordinator will then distribute copies of the solution and, along with the SJA, "hot wash" the briefings. The session will end with assignment of issues for the next phase of the operation.

There are numerous benefits of using this model to improve operational law proficiency. However, the most significant benefit is placing judge advocates in the position of actually having to resolve and brief an operational law issue. An additional benefit to this approach is that it provides the SJA an opportunity to assess the ability of his subordinates to deal with such questioning. Working through actual problems, and briefing the resolution to a notional commander, should greatly enhance understanding of the relevant legal authority related to that issue. Another benefit includes exposing the operational law attorney to a variety of legal issues and solutions by requiring him to be prepared to critique each brief. Finally, and perhaps most importantly, it should enhance the confidence of each judge advocate in his ability to manage the variety of legal issues that are encountered during an operation, resolve them efficiently and effectively, and present the resolution to the supported commander and staff. Major Corn.

APPENDIX A

PHASE OF OPERATION	METHODS AND MEANS	NON-COMB'T	FISCAL, K'S, CLAIMS	STAFF COORDN'N	LAO, DISCI-PLINE, AND ADMIN	ROE
PRE-DEPLOYMENT						
ISB						
COUNTER INSURGENCY						
DEFEND						
ATTACK						
POST CONFLICT STABILITY OPS						

APPENDIX B

EXPLANATION OF THE LEGAL OPERATING SYSTEMS

The analytical model represented by the attached matrix is built around the concept of categorizing issues into six legal operating systems (LOS). This is adapted from the Battlefield Operating System concept. Battlefield operating systems (BOS) are broad categories of combat functions used by Army leaders to aid in the planning and execution of combat operations. The seven BOS are intelligence, maneuver, fire support, air defense, mobility and survivability, logistics, and battle command. This list demonstrates that multiple combat functions of various elements of a combat unit are pigeon holed into broad categories to make them more manageable. According to *Field Manual (FM) 100-5*, "At the tactical level the battlefield operating systems [BOS], for example, enable a comprehensive examination in a straightforward manner that enhances the integration, coordination, preparation, and execution of successful combined arms operations." [104]

The legal operating systems that form the foundation of the Legal Preparation of the Battlefield (LPB) model are intended to serve the same function for the judge advocate that the battlefield operating systems serve for the commander—"enable a comprehensive examination in a straightforward manner that enhances the integration, coordination, preparation, and execution of successful [legal support]."[105] The six proposed LOS are:

Methods and Means of Warfare Issues
ROE Issues
Non-Combatant Issues
Fiscal, Contract, and Claims Issues
Staff Coordination Issues
Administrative and LAO Issues

These six categories of operational legal issues are intended to improve the delivery of proactive legal support. Instead of attempting to randomly consider every potential legal issue related to an operation, the judge advocate (JA) can think in terms of broad based systems representing commonly linked legal issues. This will hopefully help focus planning and analysis. When superimposed over the phases of the planned operation, this focus becomes even more defined and assists the JA in allocating his analytical resources in accordance with the phased focus of the supported command. While these six LOS are certainly subject to modification based on the needs of the JA, a description of each will show that almost all operational legal issues can be covered by them.

Methods and Means of Warfare Issues. This LOS is intended to include all of the traditional rules related to the targeting prong of the law of war. Specifically, any targeting related issues would fall under this LOS. The issues that are subject to analysis under this LOS include defining the role of the JA in the targeting process, from analyzing the legal versus policy based application of the law of war to analyzing the legality of proposed uses of weapons systems.

Rules of Engagement LOS. This LOS is intentionally distinct from the Methods and Means of Warfare LOS to reinforce the point that ROE are not necessarily identical to the law of war. While they may be similar in practice, this distinction ensures that the JA analyzes the legality of employing force against both ROE-based limitations and law of war-based limitations. This LOS includes issues that include ROE review and development, requests for modifications, ROE training, and the impact of ROE on specific operations.

Non-Combatant LOS. This LOS includes all issues related to non-combatants during the operation. Issues under this LOS include human rights obligations towards host nation civilians, to treatment of enemy non-combatants.

Fiscal, Contract, and Claims LOS. This LOS is intended to pull together all "money" related legal issues. Issues analyzed under this LOS include authority to expend funds for specific purposes, to solatia payments during combat operations.

Staff Coordination LOS. This LOS is intended to force the JA to think of all the coordination-related issues during the operation. It heavily emphasizes the coordination between the JA and the public affairs office, psychological operations personnel, civil affairs personnel, the Department of State, and non-government organizations (NGOs). It also encompasses anticipating common support

104. U.S. DEP'T OF ARMY FIELD MANUAL 100-5, OPERATIONS 2-12 (14 June 1993).

105. *Id.*

requirements from other staff elements. Issues that are analyzed under this LOS include coordinating NGO visits, to proposing modifications to a status of forces agreement.

LAO, Disciplinary, Administrative LOS. This LOS is intended to cover both legal assistance-related issues, and other administrative-type issues. It includes all of the classic legal assistance issues that are likely to be encountered during an operation. It also covers dealing with administrative and disciplinary issues related to civilians accompanying the force, also the logistics of actually providing legal support to the command (the "where do I go and what do I do" issues). Finally, it is intended to be a "catch-all" category to cover other issues that might fall through the cracks, such as criminal law and investigation related issues.

APPENDIX C

Legal Systems Stages	LOW (Methods-Means)	ROE	Contract and Fiscal law	Military Justice	Legal Assistance	Admin. Law	Claims	Support (Logisitics Personal Readiness, FSG)
Mobilization								
Predeployment								
Deployment								
Entry-Operations								
Operations: Close Deep Rear								
Post-conflict								
Redeployment								
Reconstitution								
Demobilization								

Contract Law Note

Federal Supply Schedules: Just Like the Local Convenience Store, But Do You Pay for Convenience[106]

Recently, we recognized the need for a new large cork bulletin board in our secretary's office here in Charlottesville. Our original plan was to simply order a new bulletin board from the Federal Supply Schedules (FSS). To our surprise, we discovered that while the bulletin board itself would be $45.00, shipping would cost an additional $60.00. Rather than pay $105.00, we visited a local office supply store with a government credit card in hand, and we purchased the same bulletin board for $40.00. In addition to ensuring that you pay a fair and reasonable price,[107] there are several recent cases that illustrate other pitfalls to these streamlined contracting vehicles. This note is intended to help you ensure that these advantageous buys constitute the success story advertised.

Competition Lives!

Our purchasers, whether they are traditional contracting officers or government credit card holders, have grown comfortable with ignoring competition on micro-purchases (under $2500).[108] Likewise, FSS buyers are naturally attracted by the General Services Administration's (GSA) predetermination that the FSS contracts are issued pursuant to full and open competition. Ordering offices, consequently, need not seek further competition, synopsize the requirement, make a separate determination of fair and reasonable pricing, or consider small business set-asides.[109] Orders at or below the micro-purchase threshold have no substantive restrictions. Buyers above micro-purchase threshold, however, are supposed to "consider reasonably available information. . . by using the *GSA Advantage!* on-line shopping service, or by reviewing the catalogs and price lists of at least three schedule contractors."[110] Note that there is no mention of small business set-asides or formal publication requirements. Thus, the competition rules are significantly relaxed, but not completely exorcised.[111] This relaxation of the rules has led buyers astray on larger buys.

The often-cited *ATA Defense Industries, Inc.* [112] case by the Court of Federal Claims illustrates the reemergence of competition considerations into the FSS world. In that case, the Army was attempting to upgrade target ranges at Fort Stewart, Georgia. The buy was executed under an existing FSS contract. However, approximately thirty-five percent of the total dollar value of the contract involved products and services that were not covered under the FSS agreement. The Army undoubtedly relied upon General Accounting Office (GAO) decisions that had permitted the inclusion of "incidentals" when making what was essentially a schedule buy.[113] The Court of Federal Claims found that Congress' mandate at 10 U.S.C. § 2304 (requiring the use of competitive procedures), does not contain an incidentals exception.[114] As a result of this decision, the existence of any de minimus exception for non-schedule items is in question.

The GAO will also review subsequent modifications to existing FSS contracts for changes that materially change the nature of the order, thereby impairing competition. In *Marvin J. Perry & Associates*,[115] the protester challenged the substitution of ash wood furniture for red oak furniture in a FSS buy for the Great Lakes Naval Training Center, Great Lakes, Illinois. The vendor actually sent ash furniture by mistake then pro-

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106. *See* General Servs. Admin, Et Al., Federal Acquisition Reg. Subpart 8.4 (June 1997) [hereinafter FAR]. This program which is, directed and managed by the General Services Administration (GSA), provides federal agencies with a simplified process for obtaining commonly used commercial supplies and services at prices that are associated with volume buying. The GSA enters into multiple award, indefinite delivery contracts with commercial firms for given periods of time. The resulting schedules provide the buyer with comparable commercial supplies and services at varying prices. Orders are placed directly with the schedule contractor and deliveries are made directly to the customer. *See* Federal Supply Service Home Page (visited May 28, 1998) < http://www.fss.gsa.gov>.

107. Do not forget that there is also a built-in one percent "industrial funding fee" included in the vendor's price on FSS purchases.

108. FAR, *supra* note 106, at 13.202. Micro-purchases, however, may be awarded without soliciting competitive quotations only where the contracting officer or individual appointed considers the price to be reasonable.

109. FAR, *supra* note 106, at 8.404(a).

110. *See* FAR, *supra* note 106, at 8.404(b)(2); *GSA Advantage*! (visited May 27, 1998) <http://www.fss.gsa.gov/cgi-bin/advantage!?38>.

111. For the market survey and publication considerations that are normally required on commercial item purchases that are in excess of the micro-purchase threshold, see the simplified acquisition procedures contained in the FAR, *supra* note 106, at 13.104-105.

112. 38 Fed. Cl. 489 (1997).

113. *See e.g.*, ViON Corporation, B-275063.2, Feb. 4, 1997, 97-1 CPD ¶ 53 (agency properly ordered items incidental to and necessary for the operation of a computer system ordered under FSS contract, which provided for the provision of such incidental items not specifically listed).

114. 38 Fed. Cl. at 502.

115. B-277684, Nov. 4, 1997, 97-2 CPD ¶ 128.

posed that the Navy accept the furniture at the same price.[116] The protester documented that vendors could have obtained ash at considerable savings over red oak, which could have translated into lower price quotations. The GAO, therefore, sustained the protest. They found that the modified order was essentially different, thus creating "concern for a fair and equitable competition that is inherent in any procurement."[117]

I'll Take One of Those, and One of Those, and . . .

Given the ease of FSS procurements, buyers can sometimes get "catalog fever," by buying what looks good rather than what actually meets the government's requirements at a reasonable price. There are some procurement officials, however, who would never dream of short circuiting a formal acquisition planning process.[118] These individuals often lose complete sight of what is really important in a catalog buy. The GAO, however, does not provide an infallible safety net all of the time. In reviewing allegations that the government has misstated its requirements, the GAO normally will only examine the agency's assessment to ensure that it has a reasonable basis.[119]

The ordering office is responsible for ensuring that the items that are purchased meet the agency's needs at the lowest overall cost.[120] Practically speaking, a challenge only arises where an agency is challenged for not buying the lowest-cost alternative on the schedules. In *CPAD Technologies*,[121] the Air Force bought nine narcotics and explosive detection systems through the FSS. The Air Force originally published a notice in the *Commerce Business Daily*, obtained product demonstrations, and ultimately determined that a schedule contractor best met the agency's needs.[122] The protester alleged that the Air Force should have purchased CPAD's lower-priced systems. The protest was dismissed, however, because the agency had documented that the awardee system's lighter weight, smaller size, and effectiveness of operation caused the agency to conclude that this system best met its needs.[123] This case illustrates why it is critical to document your reasoning when you do not select the lowest-priced alternative.

No Rules, Just Right?

The unstructured nature of the evaluation process can deceive some buyers into believing that there are no procedural rules left in FSS buys. In *COMARK Federal Systems*,[124] the Health Care Financing Administration, of the Department of Health and Human Services, issued a request for quotations (RFQ) and announced that it would issue multiple blanket purchase agreements (BPAs)[125] for a variety of computer hardware, software, and associated equipment and services. Three vendors were selected to receive BPAs.[126] Two weeks later, the agency issued RFQ 0008 for 1950 desktop workstations. All of the items that were offered were to be off of FSS. The RFQ, however, did not list any evaluation criteria.[127] When COMARK's low, technically acceptable quote was not selected, they protested, contending that the agency had conducted an improper "best value"[128] analysis. The GAO sustained the protest and concluded that the RFQ did not accurately state the agency's requirements and that the protester

116. *Id.* at 2.

117. *Id.* at 5.

118. *See* FAR, *supra* note 106, at 7.105. Contents of Written Acquisition Plans.

119. Midmark Corp., B-278298, Jan. 14, 1998, 98-1 CPD ¶ 17.

120. FAR, *supra* note 106, at 8.404(a).

121. B-278582.2, Feb. 19, 1998, 98-1 CPD ¶ 55.

122. *Id.* at 1.

123. *Id. See also* Commercial Drapery Contractors, Inc., B-271222.2, June 27, 1996, 96-1 CPD ¶ 290 (issuance of FSS orders were improper where the urgency that was alleged was caused by delays which were incident to the prior improper issuance and subsequent cancellation of purchase orders for the same requirement to the same vendor in response to clearly meritorious protests).

124. B-278323, Jan. 20, 1998, 98-1 CPD ¶ 34.

125. *See* FAR, *supra* note 106, at 13.210. Blanket purchase agreements are a simplified acquisition tool to fill anticipated repetitive needs for supplies and services by establishing "charge accounts" with qualified sources. BPAs are permitted in FSS contracting. FAR, *supra* note 106, at 8.404(b)(4).

126. *COMARK*, B-278323 at 6.

127. *Id.*

128. "Best value" procurements are now defined as any acquisition that obtains the greatest overall benefit in response to a government requirement. *See* FAR, *supra* note 106, at 2.101. The term "trade-off approach" is now used to describe the kind of cost-benefit analysis that has traditionally been understood as a best value procurement.

was not prejudiced by the agency's action.[129] The lesson learned is that you must provide reasonable guidance about selection criteria should you decide to get innovative in your FSS buys.

When You Are Buying Too Much of a Good Thing

Each schedule has an established maximum order threshold.[130] This threshold represents the point where, in GSA's opinion, it is advantageous for the ordering office to seek a price reduction.[131] Where further price reductions are not offered, an order may still be placed, if the ordering office determines that it is still appropriate to do so.[132] Also, there is no prohibition against seeking discounted prices on orders that are below the maximum order threshold. Customers that obtain further price reductions may still place orders against the FSS contract and the contractor need not extend that price reduction to all FSS ordering offices.[133]

Conclusion

It takes more than statutory and regulatory changes to benefit from procurement reform. Increased discretion in government procurements demands good business judgment and reasoned action, as the Defense Logistics Agency recently learned after it was revealed that the armed services are paying outrageous prices for weapons systems spare parts using commercial items procurement techniques.[134] Buyers that are conscious of the business judgment, competition, and procedural issues still relevant to FSS buys will make the best use of these advantageous contractual vehicles. Major Freeman.

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129. *COMARK*, B-278323 at 6.

130. Customer orders were once restricted by a maximum order limitation. Buys that were in excess of that limitation were vulnerable to a challenge under the Competition in Contracting Act, 10 U.S.C.A. § 2304. *See* Komatsu Dresser Co., B-246121, Feb. 19, 1992, 92-1 CPD ¶ 202 ("re-quote arrangements" clause that provided for limited competitions only among schedule contractors for requirements that exceeded the maximum order limitation are a violation of CICA).

131. FAR, *supra* note 106, at 8.404(b)(3).

132. *Id.*

133. FAR, *supra* note 106, at 8.404(b)(5).

134. *See* Eleanor Hill, Inspector General, Department of Defense (DOD), Remarks before the Subcommittee on Acquisition and Technology on Armed Services Committee, United States Senate (March 18, 1998), *in* S. REP NO. 98-093 (1998). The report is available on the Internet at http://www.dodig.osd.mil/fo/index.html (visited May 27, 1998). In mid-1996, the DOD Inspector General's Office received complaints relating to overpriced aircraft spare parts purchases by DLA. Audits revealed that DOD's procurement approaches were "poorly conceived, badly coordinated and did not result in the government getting good value for the prices paid." *Id.* at 5. The worst example cited were setscrews, purchased for $75.60 each (a 13,163 percent increase over a previous price of 57 cents). *Id.* All of the audited transactions were sole-source procurements, not FSS buys.